Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT MOTTL,

Petitioner,

v.

MISSOURI LAWYER TRUST ACCOUNT FOUNDATION,
HONORABLE STEPHEN N. LIMBAUGH, JR.,
HONORABLE DUANE BENTON,
HONORABLE WILLIAM RAY PRICE, JR.,
HONORABLE RONNIE L. WHITE,
HONORABLE MICHAEL A. WOLFF,
HONORABLE LAURA DENVIR STITH AND
HONORABLE RICHARD B. TEITELMAN,

Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Missouri's Interest on Lawyer Trust Accounts ("IOLTA") program differs from the IOLTA program in the State of Washington which this Court approved in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), in that Missouri lawyers are required to deposit all nominal or short-term funds of their clients into IOLTA accounts, whether or not those funds might earn interest elsewhere. Lawyers must choose once a year whether or not to participate in the program for the remainder of that year. This case presents the following question:

Whether Missouri's program is immune from challenge as a taking of property for public use without just compensation, on the theory that it involves no "state action" because (1) the state allows lawyers voluntarily to opt out of participation in the otherwise mandatory IOLTA program on an annual basis and (2) the lawyers' private decisions to participate, entwined with the otherwise actionable taking of property by state actors, "destroy state action" even with regard to taking claims solely against those state actors.

LIST OF PARTIES

The Petitioner, Robert Mottl, appears by Mark D. Mittleman, 222 South Central Avenue, Suite 900, St. Louis, Missouri 63105, Counsel of Record, and by the following additional counsel: Robert M. Heggie and the law firm of Beach, Stewart, Heggie, Mittleman & Curtis, L.L.C., 222 South Central Avenue, Suite 900, St. Louis, Missouri 63105; and Charles R. Watkins, John R. Wylie and the law firm of Susman & Watkins, Two First National Plaza, Suite 600, Chicago, Illinois 60603.

The Respondent, Missouri Lawyer Trust Account Foundation, appears by Charles A. Weiss, John W. Rogers, Jennifer M. Kingston and the law firm of Bryan Cave LLP, One Metropolitan Square, Suite 3600, 211 North Broadway, St. Louis, Missouri 63102.

The Respondents, Honorable Stephen N. Limbaugh, Honorable Duane Benton, Honorable William Ray Price Jr., Honorable Ronnie L. White, Honorable Michael A. Wolff, Honorable Laura Denvir Stith and Honorable Richard B. Teitelman, the Judges of the Supreme Court of Missouri, in their official capacity, appear by Jeremiah W. (Jay) Nixon, Attorney General of Missouri, Karen King Mitchell, Deputy Attorney General, Paul R. Maguffee and Dustin J. Allison, Assistant Attorneys General, P. O. Box 899, Jefferson City, Missouri 65102. Judge Benton resigned from the Supreme Court of Missouri effective July 8, 2004. His successor has not yet been selected.

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On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

Robert Mottl, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Missouri Court of Appeals, Western District, in the case styled *Robert Mottl v. Missouri Lawyer Trust Account Foundation, et al.*, 133 S.W.3d 142 (Mo.App.W.D. 2004).

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, in the case styled *Robert Mottl v. Missouri Lawyer Trust Account Foundation, et al.*, 133 S.W.3d 142 (Mo.

App.W.D. 2004), may be found in the Appendix to this Petition, Appendix A, at pages 1a-9a.

JURISDICTION

Petitioner Robert Mottl commenced a civil action in the Missouri state courts, alleging that Respondents took his property for public use without just compensation pursuant to the Interest on Lawyer Trust Accounts (IOLTA) program created by the Missouri Supreme Court's Rule of Professional Conduct 4-1.15 (Appendix E, pages 18a-21a), and seeking damages and equitable relief under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983. (Appendix F, pages 22a-36a.) The Circuit Court of Cole County, Missouri, dismissed the action with prejudice, on motions filed by the Respondents (Appendix G, pages 37a-41a; Appendix H, pages 42a-46a), for failure to state a claim upon which relief can be granted. (Appendix B, pages 10a-15a.) Petitioner timely appealed the dismissal to the Missouri Court of Appeals, Western District, which on March 23, 2004, issued an opinion, 133 S.W.3d 142 (Appendix A, pages 1a-9a), affirming the judgment of the Circuit Court. Petitioner then timely filed in that Court of Appeals a Motion for Rehearing, or in the Alternative, Application for Transfer to the Supreme Court of Missouri (Appendix J, pages 49a-63a), which the Court of Appeals denied on April 27, 2004 (Appendix C, page 16a). Petitioner then timely filed an Application for Transfer to the Supreme Court of Missouri (Appendix K, pages 64a-75a), which the Supreme Court of Missouri denied on May 25, 2004 (Appendix D, page 17a). The Missouri Court of Appeals, Western District, was therefore the highest state court in which a decision could be had in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States: the Fifth Amendment, which provides, in pertinent part:

> ". . . nor shall private property be taken for public use without just compensation";

and the Fourteenth Amendment, Section 1, which provides, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws";

and the following provision of the United States Code: 42 U.S.C. § 1983, which provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable";

and the following rule of the State of Missouri, promulgated by the Supreme Court of Missouri: Missouri Rule of Professional Conduct 4-1.15, set out in the Appendix to this Petition as Appendix E, pages 18a-21a.

STATEMENT OF THE CASE

Petitioner Robert Mottl originally filed this civil action in the Circuit Court of Cole County, Missouri, on behalf of himself and a class of similarly situated persons. Petitioner alleged that Respondents took his and the class's property for public use without just compensation, pursuant to the Interest on Lawyers' Trust Accounts ("IOLTA") program established under Missouri Rule of Professional Conduct 4-1.15(d) (the "Rule") regulating the state's bar. His pleading was in two counts, under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983 respectively, seeking both damages to compensate him and the class, and prospective equitable relief against unconstitutional application and enforcement of the Rule. (Appendix F, pages 22a-36a.) He contended that material differences between the Rule in Missouri and the Washington state rule involved in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), justified the relief he sought. The Circuit Court of Cole County dismissed Petitioner's action with prejudice (Appendix B, pages 10a-15a) on the Respondents' motions to dismiss (Appendix G, pages 37a-41a; Appendix H, pages 42a-46a), for failure to state a claim upon which relief can be granted, without hearing or determining the issue of class certification. The Missouri Court of Appeals, Western District, affirmed the Circuit Court's judgment, solely on the ground that the required element of "state action" for Petitioner's claims under federal law was absent from the case. (Appendix A, pages 1a-9a.) The Supreme Court of Missouri denied Petitioner's application for transfer of the appeal. (Appendix D, page 17a.)

The Supreme Court of Missouri's Rule of Professional Conduct 4-1.15(d) requires Missouri lawyers to deposit all funds of their clients which "are nominal in amount or are expected to be held for a short period of time" into a pooled interest-bearing trust account established with a bank or

savings and loan association, with the Respondent Missouri Lawyer Trust Account Foundation (the "Foundation") designated as the income beneficiary. Each participating lawyer or law firm directs the depository institution to remit the net interest or dividends computed on the average monthly balance of the account, or as otherwise computed in accordance with the institution's standard accounting practice, directly to the Foundation. The Foundation, a not for profit Missouri corporation, is the beneficiary and administrator of the state's IOLTA program, which allows interest to be earned on such nominal or short-term client deposits held in lawyers' pooled trust accounts and paid to the Foundation. The Foundation then distributes the income to various legal aid agencies and programs for the administration of justice and for civil legal services to low-income individuals and families, in an amount exceeding $5,000,000 since 1998. (Appendix E, pages 18a-21a; Appendix F, pages 27a-29a.)

On November 3, 1999, Robert M. Heggie, a Missouri lawyer, deposited $3,600.00 of the funds of Petitioner Robert Mottl, his client, into an IOLTA account at Mercantile Bank N.A. in St. Louis, where Heggie held all or part of such funds continuously from November 3, 1999 to November 8, 1999. The funds were the proceeds from a settlement of certain claims of Petitioner for damages arising out of personal injuries, in connection with which Heggie and Allan F. Stewart had represented him. The funds were to be allocated in part to Heggie and Stewart, for payment of their attorneys' fees and reimbursement of the expenses they had advanced in connection with the prosecution of the claims, with the remainder to be paid out to Petitioner. Heggie made the deposit after determining that the $3,600.00 of Petitioner's funds were nominal or short-term in nature, and thereafter he left the funds in the IOLTA account on behalf of Petitioner from November 3, 1999 to November 8, 1999, before distributing them as contemplated by his agreements with Petitioner. Petitioner did not desire to have his funds

deposited into or retained in the IOLTA account pending their distribution. The Foundation collected all the interest from the pooled IOLTA account into which the funds had been deposited. The Foundation has not returned the interest gained on Petitioner's funds in the IOLTA account nor compensated Petitioner for the use of his funds. (Appendix F, pages 29a-30a.)

Petitioner filed this two-count action in the Circuit Court of Cole County, Missouri, a state trial court of general jurisdiction, on December 19, 2002, alleging that, pursuant to the Rule and the IOLTA program, the Respondents (the Foundation and the members of the Supreme Court of Missouri, named as parties in their official capacity) unconstitutionally took his and the class's property for public use without just compensation. Count I premised those claims on the Fifth and Fourteenth Amendments to the Constitution of the United States; Count II raised them under 42 U.S.C. § 1983. In each Count, Petitioner sought both compensatory damages for the taking of his and the class's property, and prospective equitable relief. (Appendix F, pages 22a-36a.)

On February 14, 2003, the Foundation moved, pursuant to Missouri Rule of Civil Procedure 55.27(a)(6), to dismiss the action on the grounds that it failed to state a claim upon which relief can be granted. The Foundation contended in its motion that participation in the IOLTA program "is neither coerced nor compelled by the State, but rather merely authorized, or at most encouraged", and that "Because the State does not compel the attorney or client to place client funds in an IOLTA account under Rule 4-1.15 and such action is a voluntary choice of the attorney and client, there is no state action and no violation of the Takings Clause." (Appendix G, pages 37a-41a.) On the same day, February 14, 2003, the Attorney General of Missouri, on behalf of the members of the state Supreme Court ("the Supreme Court Respondents"), filed their "Motion to Dismiss or, in the

Alternative, to Join Indispensable Party and Disqualify Opposing Counsel." This motion similarly contended that the Petition should be dismissed pursuant to Rule 55.27(a)(6) because "as a matter of law, there was no state action involved in the placement of Plaintiff's funds--or those of any other client--into an IOLTA account." It also asserted that the Supreme Court Respondents were entitled to legislative immunity for promulgating the Rule, and that if the court were to find state action at all, the only person who could be viewed as a "state actor" responsible for placing Appellant's funds into an IOLTA account was his own lawyer, Heggie, "without being mandated by any other defendant to do so", thereby making Heggie an "indispensable party" who under Missouri Rules of Civil Procedure 52.04 and 55.27(a)(7) would have to be joined as a defendant and then disqualified as Petitioner's counsel. (Appendix H, pages 42a-46a.)

Petitioner has never conceded either that his lawyer's participation in the IOLTA program at the time of the deposit was voluntary, or that the actual deposit of his funds into an IOLTA account was either voluntary or improper as a matter of state law, but rather has maintained that Missouri's Rule instructed (and arguably even compelled) his lawyer to make the deposit. (*See* Appendix F, pages 23a, 27a, 32a; Appendix I, pages 47a-48a.)

On April 18, 2003, the Circuit Court dismissed the Petition with prejudice for failure to state a claim upon which relief can be granted, without hearing or determining the issue of class certification. (Appendix B, pages 10a-15a.) The Circuit Court's Order and Judgment stated that the holding of *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), applied to Petitioner's claims and required a finding that there was no taking of Petitioner's property without just compensation, because "the aspect of Washington's Rule that the Supreme Court focused on in *Brown* is indistinguishable from Missouri's Rule 4-1.15," forbidding the deposit of funds into

an IOLTA account if they could earn net interest for a client. (Appendix B, page 13a.) In addition, the Order and Judgment stated that participation in the IOLTA program is voluntary for Missouri lawyers, and that even lawyers who participate in it voluntarily act "contrary to the provisions" of the Rule if they deposit client funds capable of earning net interest, so that any loss of such net interest would not be "attributable ... to any state action" and Petitioner "cannot satisfy the state action requirement." (Appendix B, pages 14a-15a.)

The Circuit Court overruled Petitioner's Motion for Reconsideration and Amendment of its ruling on July 28, 2003, and Petitioner timely filed a direct appeal to the Missouri Court of Appeals, Western District, the appropriate court for such an appeal pursuant to Article V, Section 3 of the Constitution of Missouri and Section 477.070, R.S.Mo. Petitioner contended that the Circuit Court had erred in dismissing the action outright for failure to state a claim upon which relief can be granted. He argued, on the key issues of the appeal, that the Respondents' confiscation of the net earnings on client funds deposited into lawyers' IOLTA trust accounts pursuant to the Rule was indeed a taking of private property without just compensation, in that it was legally error for the Circuit Court (A) to conclude that funds which could have earned net interest for clients could not have been properly deposited into those IOLTA accounts, and (B) to hold that any such deposits by lawyers were both voluntary and improper, so that they would wholly negate the Respondents' role, as state actors, in taking such interest earnings for public use. (*See* Appendix I, pages 47a-48a.)

On March 26, 2004, that Court of Appeals affirmed the judgment of the Circuit Court. (Appendix A, pages 1a-9a.) The Court of Appeals's opinion stated that "Because the issue of state action is dispositive in this case, Mr. Mottl's first

point is not addressed." It held, 133 S.W.3d at 146-148 (Appendix A, pages 6a-7a, 8a-9a):

> "State action requires both action taken pursuant to state law and significant state involvement. . . . While the deposit of Mr. Mottl's funds into an IOLTA account and the transfer of interest earned on the account to the Foundation were authorized by Rule 4-1.15, thus satisfying the first requirement of the state action test, the inquiry does not end there. Rather, Mr. Mottl must also satisfy the second requirement, whether the allegedly unconstitutional conduct is fairly attributable to the State. . . .
>
> Unlike the Washington IOLTA program analyzed in *Brown*, which mandates participation, Missouri's program is voluntary. . . . Thus, the acts of depositing client funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation are not attributable to the State.
>
> *Brown* reinforces this holding. The Supreme Court noted that lawyers might mistakenly deposit client funds into an IOLTA account even though they could have generated net income for the client. . . . Doing so, however, would be contrary to the Washington Supreme Court rule, and '[a]ny conceivable net loss . . . was the consequence of . . . incorrect private decisions rather than any state action.' . . . This reasoning supports the decision in this case that private decisions to deposit client funds into a Missouri IOLTA account destroy state action."

The Supreme Court of Missouri denied further review (Appendix D, page 17a), although in each of his post-opinion pleadings Petitioner raised essentially the same question which is presented by this Petition for Writ of Certiorari in regard to the holding of the Court of Appeals. (Appendix J, pages 49a-63a; Appendix K, pages 64a-75a.)

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of Missouri's ethical rule constitutes state action. Its Interest on Lawyer Trust Accounts ("IOLTA") program is not immune from challenge as a taking of property for public use without just compensation, because it does involve state action, notwithstanding its provisions allowing lawyers voluntarily to opt out of participation in the otherwise mandatory IOLTA program on an annual basis; and the state court's decision on this issue conflicts with relevant decisions of this Court, including *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

The Missouri Court of Appeals chose to decide this case solely on an erroneous federal ground, without even addressing the key intertwined issue of state and federal law presented to it: whether the Rule in Missouri is or is not materially different from the Washington state rule at issue in *Brown v. Legal Foundation of Washington.* A reasonable interpretation of the Missouri Rule would demonstrate major differences from Washington's rule, entitling Petitioner to prevail on the merits of his taking and just compensation claims. But the ground on which the court below relied is itself unreasonable, in conflict with the relevant federal law of "state action"--including that implicit in this Court's opinion in *Brown*--and insufficient to avoid a decision on the merits of the taking and compensation issues here.

The issue on which the Missouri Court of Appeals decided the case is not even a real issue, given this Court's decision in the *Brown* case, on which Petitioner's claims are directly founded. This Court characterized the issues which it decided in *Brown* as follows (538 U.S. at 220):

> "In *Phillips v. Washington Legal Foundation*, 524 U.S. 156, . . . (1998), a case involving the Texas IOLTA program, we held 'that the interest income generated by

> funds held in IOLTA accounts is the "private property" of the owner of the principal.' *Id.*, at 172, ... We did not, however, express any opinion on the question whether the income had been 'taken' by the State or 'as to the amount of "just compensation," if any, due respondents.' *Ibid.* We now confront those questions."

On the first of those two questions, this Court held that the income ***was in fact taken by the State*** of Washington, and was a "*per se*" taking of the funds by the State, rather than a "regulatory taking." However, the majority opinion then found that, under the particular features of the Washington rule, no "just compensation" was due to the plaintiffs or anyone else, because they sustained no "net loss" from the taking. No clients in the state of Washington could sustain such a loss because, as the majority found, "The Rules adopted and administered by the Washington Supreme Court ***unambiguously require*** lawyers and LPOs to deposit client funds in ***non-IOLTA accounts whenever*** those funds could generate net earnings for the client." (538 U.S. at 239 [emphasis added].)

But there could have been no "taking" by the State of Washington within the meaning of the Fifth and Fourteenth Amendments without "state action." The very idea of a state "taking" which is not "state action" is an oxymoron. There would also have been no constitutional question of "just compensation" to review, but for the fact that compensation was denied by the State and not merely by a private party. *Id.* at 234-235; *id.* at 242 and 251 n. 7 (Scalia, J., dissenting). The Court could never even have reached the taking and compensation issues in *Brown* if no state action were involved; it would have lacked a prerequisite to decide the merits of those issues.

There is *dictum* in *Brown*, 538 U.S. at 239, which suggests that any loss suffered by the Washington plaintiffs was caused by their lawyers' private decision not to comply with

the clear requirements of the Washington rule. That is, if interest could be earned in a non-IOLTA trust account, the Washington lawyer must avail himself of that opportunity and not use the IOLTA account. Washington had specifically designed its rule to prevent any net loss to the client. The application of this *dictum* to the Missouri Rule would not be possible without first deciding the question that the Missouri Court of Appeals expressly declined to decide: whether Missouri's Rule is materially different from Washington's, as Petitioner contended, or (as Respondents had argued and the Circuit Court of Cole County had erroneously opined) is "indistinguishable" from it.

The purportedly "voluntary" aspects of the Rule, on which the Missouri Court of Appeals based its conclusion that state action was absent, are neither obvious nor unambiguous. They provide little guidance and little freedom of action to the lawyers who must comply with the Rule, and virtually none to clients.[1] But, more importantly, even to the extent that they exist at all, they still do not eliminate or negate the role of the state and its officials who take and use the interest

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[1] The IOLTA program is not actually voluntary. As the former president of the Respondent Foundation wrote when the Rule was amended to its present form, "The amendment changed our IOLTA program from a purely voluntary plan to an 'opt-out' plan." W. Fleischaker, *Your Bar at Work: Trust Funds and IOLTA*, 46 J.Mo.Bar 319 (1990). Moreover, the only option lawyers have to except themselves from participation in the program must be exercised on an annual basis, by notice in writing before January 31, after which the option becomes unavailable until the following year; and the Rule is anything but clear in identifying this option to the members of the bar, first making it appear that participation is mandatory for all lawyers who are not "exempt," and only later disclosing the option through a maze of cross-references. Rule 4-1.15(d), (e)(4) and (f), Appendix E, pages 18a-21a. Participation is completely involuntary for the lawyers' clients, because the controlling Internal Revenue Service ruling, Rev. Rul. 81-209, 1981-2 C.B. 16, makes IOLTA earnings non-taxable only where the clients have no choice regarding the deposit of their funds into IOLTA accounts.

earned on client funds once those funds are placed into IOLTA accounts. Respondents' taking and use of the funds, as contemplated and authorized by the Rule, supplies all the "state action" required to support Petitioner's claims. No authority, and certainly not the cases cited by the court below, supports a contrary conclusion. A long, familiar line of decisions by this Court shows instead that voluntary private acts, combined or entwined with state officials' acts, ***are*** remediable as state action.

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); *United States v. Price*, 383 U.S. 787 (1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *West v. Atkins*, 487 U.S. 42 (1988); and *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), are all inconsistent with the Missouri courts' analysis. To uphold the Court of Appeals's decision on the merits would require this Court not only to re-examine, but to overrule those precedents.

The opinion below attempted to avoid finding the state action which is clearly present in this case, and thereby to save Missouri's Rule, by mischaracterizing Petitioner's claims. It argued that "The acts of which Mr. Mottl complains, of [*sic*] which he contends constitutes a taking of his personal property without just compensation, are the acts of his attorney in depositing his funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation." (Appendix A, page 7a.) That statement is untrue both as a matter of fact and law. Nowhere in Petitioner's pleading did he complain of the acts of his own attorney, who was not even a party in the case. Legally, it would have made no sense for Petitioner to complain of the acts of the attorney in an action brought, instead, against the state actors who are Respondents. *Brown*, *supra*, 538 U.S. at 234-235, and at 251 n. 7 (Scalia, J., dissenting). It would

have made even less sense for Petitioner to complain against the attorney in an action like this one, the very premise of whose claims is the taking of Petitioner's property ***for public use without just compensation***. The Missouri Court of Appeals's mischaracterization of the issues which Petitioner had properly raised thus went far beyond a mere judicial error, such as an incorrect factual finding or a misapplication of a properly stated rule of law, or an adequate state ground on which certiorari might be denied. It was a challenge to more than forty years of settled constitutional law in the federal courts, to protect an indefensible Rule and conduct by the State of Missouri and its judicial system; and, as such, it must not go unreviewed.

2. Private decisions entwined with the otherwise actionable taking of property by state actors do not "destroy state action" for purposes of claims against those state actors; and the state court's decision on this issue conflicts with relevant decisions of this Court, including *Brown v. Legal Foundation of Washington* and *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), as well as decisions of United States Courts of Appeals, including *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993).

This case fulfills the standard for a grant of certiorari under this Court's Rule 10(b) as well as Rule 10(c). The state court of last resort has decided an important federal question in a manner that conflicts not only with the relevant decisions of this Court—including all those cited above: *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *United States v. Price*, 383 U.S. 787 (1966); *Evans v. Newton*, 382 U.S. 296 (1966); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); *West v. Atkins*, 487 U.S. 42 (1988); and *Brentwood*

Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001)—but also with the decisions of at least one United States Court of Appeals. *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), states the established law on that federal question as follows [emphasis added]:

> "A private individual may be subject to liability under this section if he or she willfully collaborated with an official state actor in the deprivation of the federal right. *See* [*Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)] at 152 . . . ('"Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."' (quoting *United States v. Price*, 383 U.S. 787, 794 . . . (1966)). ***Conversely, a state actor may be subject to liability for an action physically undertaken by private actors in violation of the plaintiff's liberty or property rights if the state actor directed or aided and abetted the violation.*** *See, e.g., Fries v. Barnes*, 618 F.2d 988, 991 (2d Cir. 1980)."

Fries v. Barnes, *supra*, states that a "government agent may not escape responsibility by claiming that the violation of the plaintiff's rights was committed by the private person involved in such a collaborative undertaking." In *The Tool Box v. Ogden City Corporation*, 316 F.3d 1167, at 1177 (10th Cir. 2003), *vacated on other grounds* 355 F.3d 1236 (10th Cir. 2004), the Tenth Circuit cited the "entwinement" principle of *Brentwood Academy*, *supra*, in holding that the actions of a single private party, a member of the "Review Board" enforcing the restrictive covenants of a municipally owned industrial park, cannot "transform" that otherwise public agency "into a private actor", which "would be to turn a blind eye to structural realities".

The Third Circuit's opinion in *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980), an action challenging the constitutionality of Pennsylvania's postjudgment garnishment statutes on due process and supremacy clause grounds, is also

irreconcilable with the Missouri Court of Appeals's theory that private conduct can "destroy state action," even if the named defendant state actors' role is only ministerial. Both the majority, which held the Pennsylvania statute unconstitutional, and the dissenting opinion in *Finberg* agreed that the plaintiff's complaint against the prothonotary and sheriff who respectively issued a writ of execution and served it on a garnishee, at the behest of a private judgment creditor, had "named defendants who meet the prerequisites to adjudication in a federal court." *Id.* at 53-54. As stated in the dissenting opinion, *id.* at 65, "The appellees before us wear the appropriate public costumes to furnish a modicum of state action, thereby becoming the vehicle by which an ordinary dispute between a debtor and creditor has been transmogrified into a federal case by virtue of 42 U.S.C. § 1983." The majority opinion held, *id.* at 54:

> "In Ex Parte Young, 209 U.S. 123, 157, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908), the seminal decision on suits to restrain the enforcement of laws alleged to be unconstitutional, the Supreme Court held that a particular official was properly named as a defendant if the official 'by virtue of his office has some connection with the enforcement of the act.' ... This conclusion is not altered by the fact that the duties of the prothonotary and the sheriff are entirely ministerial. Under Ex Parte Young the inquiry is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights. We note that courts often have allowed suits to enjoin the performance of ministerial duties in connection with allegedly unconstitutional laws."

The mere fact that Petitioner's private attorney was the person who deposited Petitioner's funds into an IOLTA account subject to Missouri's Rule—"voluntarily" or otherwise—does not "destroy" the state action of Respondents in taking his property from that account for public use with-

out just compensation. The decisions of federal Courts of Appeals, as well as this Court, conflict with the clearly incorrect and unprecedented holding on that point by the state court of last resort here, justifying the grant of a writ of certiorari to review the Missouri decision.

3. Missouri's taking of the net interest earned on clients' funds is compensable, notwithstanding their lawyers' prior failure to opt out of the IOLTA program, because the rule governing the program at least permits and arguably requires those lawyers who participate in the program to make deposits of funds which can earn net interest for the clients, and thereby differs materially from the Washington state rule at issue in *Brown v. Legal Foundation of Washington*.

Brown was not the last IOLTA case this Court will have to address. As the four dissenting Justices noted at the time, there are contradictions in the *Brown* majority's theory that the Washington plaintiffs had suffered no net loss, which will necessarily affect future cases in the lower courts. *Id.* at 538 U.S. 244 (Scalia, J., dissenting). Moreover, as Justice Kennedy noted in *Brown*, IOLTA programs raise First Amendment issues which "may have to come before the Court in due course." *Id.* at 538 U.S. 253 (Kennedy, J., dissenting). While the present case does not raise First Amendment issues, it definitely requires the Court to revisit the issue of the net loss to Petitioner under Missouri's Rule.

The fundamental issue Petitioner raised in this case, but the Missouri Court of Appeals attempted to avoid, is whether the Missouri Rule is materially different from—or identical to—the Washington rule, Washington Rule of Professional Conduct 1.14, which this Court upheld in *Brown*. Petitioner's position is that Missouri's Rule is not only facially, textually different from Washington's rule, as should be obvious from

a comparison of their literal terms, but is legally and materially different in the key respects which should determine the outcome of this case. Unlike the "categorical requirement" of the Washington rule, which absolutely and "unambiguously" requires lawyers to deposit their clients' funds into non-IOLTA accounts, and forbids them to deposit those funds into IOLTA accounts, "whenever those funds could generate net earnings for the client" (*id.* at 538 U.S. 239), Missouri's Rule *compels* the deposit of such funds into IOLTA accounts. On the logic of *Brown* itself, the application of the Rule has thus caused the unconstitutional taking of Petitioner's property without just compensation. Petitioner has stated a claim upon which relief can be granted, and the Missouri courts' judgments to the contrary should be reversed.

In fact, the various states' IOLTA programs differ in a variety of ways, and many of them, including Missouri, do not have the specific features of Washington's program which this Court had relied upon to find that the *Brown* plaintiffs suffered no compensable net loss from the taking of their property. The Florida, Indiana, Illinois, Texas and Virginia rules, for example, are identical neither to Washington's nor Missouri's, nor to each other. *See* Florida Bar Rule 5-1.1; Illinois Rule of Professional Conduct 1.15; Indiana Rule of Professional Conduct 1.15; Texas State Bar Rules, Art. X § 9, Rule of Professional Conduct 1.14, and Texas Equal Access to Justice Program, Article XI §§ 1-9; Virginia Integration of the State Bar Rules, Va.R.S.Ct., Pt. 6 § 2, Rule of Professional Conduct 1.15, and Va.R.S.Ct., Pt. 6 § 4, ¶ 20.

Some state IOLTA programs are mandatory in whole or in part, as applied to the lawyers governed by their rules, while others are voluntary. State IOLTA rules typically require the deposit of "nominal or short-term" funds of clients into IOLTA accounts, but they differ in their description of what

such funds are.[2] They also differ in their specific provisions for the consequences of mistakenly depositing client funds which are not "nominal or short-term," and do not necessarily conform to the Washington rule discussed in *Brown*, *supra*, that lawyers would incur personal liability for doing so.[3]

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[2] Of the seven states' rules cited here, only Florida's actually contains an express definition of the term: "'nominal or short term' describes funds of a client or third person that, pursuant to subdivision (3) below, the lawyer has determined cannot practicably be invested for the benefit of the client or third person". Florida Bar Rule 5-1.1(g)(1)(A). Illinois, Indiana, Texas and Washington all use "nominal or short-term" or similar language in their IOLTA rules (Virginia does not), but none of them directly defines it. Indiana sets out a list of "factors" which lawyers "shall take into consideration" in the exercise of good faith judgment "in determining whether funds of a client are of such nominal amount or are expected to be held for a short period of time". Indiana Rule of Professional Conduct 1.15(h). Illinois's rule lists a similar group of "factors" to Indiana's, but refers to them as the factors that lawyers "shall take into consideration" in determining "the type of account into which to deposit particular funds of a client," under Illinois Rule of Professional Conduct 1.15(e).

[3] Illinois states only that a lawyer's "decision as to whether funds are nominal in amount or are expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer." Illinois Rule of Professional Conduct 1.15(d)(5). Texas lists no specific factors to determine if funds are "nominal in amount" or "reasonably anticipated to be held for a 'short period of time,'" but states that lawyers are "not liable in determining which funds are nominal in amount or on deposit for a short period of time if the determination is made in good faith in accordance with the rules." Texas State Bar Rules, Art. XI § 7. Florida and Illinois, like Texas, have inserted provisions into their state IOLTA rules which immunize lawyers from both civil liability to their clients, and professional disciplinary action, for any mistaken decisions in depositing the clients' funds into IOLTA rather than non-IOLTA accounts; the Illinois immunity rule appears to go even further than those of Florida and Texas, by omitting any reference to a requirement of good faith. Florida Bar Rule 5-1-1(g)(3)(E); Illinois Rule of Professional Conduct 1.15(d)(5); Texas State Bar Rules, Art. XI § 7. Virginia and Washington provide no such immunity.

Some even recognize that they pose a constitutional taking problem in those instances where lawyers make deposits of client funds that could earn net interest into IOLTA accounts and therefore provide clients a compensation mechanism to deal with it.[4]

This Court's opinion in *Brown* could only save the Washington IOLTA program by delineating precisely those clear, specific features of the text of the Washington rule which made it legally ***impossible*** (and not simply unlikely) for clients to sustain a loss attributable to the state's *per se* taking of interest on their funds. But those features are not found in the IOLTA rules of other states, including Missouri. The *Brown* majority pointed to the declaration of the Supreme Court of Washington in its *IOLTA Adoption Order*, 102 Wash.2d 1101 (1984), that in the face of public criticism of the originally proposed rule, the court had felt the necessity to include such absolutely unambiguous language within the rule's text:

> "in order to make it even clearer that IOLTA funds are only those funds that *cannot, under any circumstances*, earn *net* interest (after deducting transaction and administrative costs and bank fees) for the client, we have amended the proposed rule accordingly. *See* new CPR DR 9-102(C)(3). The new rule makes it absolutely clear that the enumerated factors are merely facets of the ultimate question of whether client funds could be

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[4] Indiana, like Florida, Illinois and Texas, has an immunity provision for lawyers, Indiana Rule of Professional Conduct 1.15(h), but in contrast to Florida and Illinois, it actually provides a mechanism for clients to obtain from the Indiana Bar Foundation a refund of moneys wrongfully withheld from them by reason of their lawyers' mistaken decisions to deposit their funds into IOLTA accounts. Indiana Rule of Professional Conduct 1.15(d)(7). Texas's rules suggest that such a remedy may be available, although they do not expressly provide one. Texas State Bar Rules, Art. XI § 8.

> invested profitably for the benefit of clients. If they can, then investment for the client is mandatory."

Id. at 1113-1114 [emphasis in original], cited in *Brown*, *supra*, 538 U.S. at 227. Therefore, the majority in *Brown* added, "Given the court's explanation of its Rule, it seems apparent that a lawyer who mistakenly uses an IOLTA account as a depositary for money that could earn interest for the client would violate the Rule." *Id.* But the provisions of the Washington rule are strikingly different from Missouri's Rule, both in their unequivocal clarity and in their substance.

The Missouri Rule does ***not*** expressly order lawyers to make a choice for the deposit of their clients' funds, as between (1) an IOLTA account of the type established by the rule, and (2) one of two different, specifically described types of separate interest-bearing trust accounts, either for "(i) the particular client or client's matter on which the interest will be paid to the client; or (ii) a pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client." Nor, even more importantly, does it compel lawyers to make that choice based "only" on "whether the funds to be invested could be utilized to provide a positive net return to the client." *Compare* Washington Rule of Professional Conduct 1.14(c).

There is no unambiguous requirement in Missouri that funds be placed in a non-IOLTA account if they "could be utilized to provide a positive net return to the client." To the contrary, in fact, if lawyers have not certified under Rule 4-1.15(e) by January 31 of any given year, together with their annual enrollment fee statement for that year, that they are "exempt" from participation in the IOLTA program, during that year Rule 4-1.15(d) will require that they must deposit "***all*** funds of clients that are nominal in amount or are expected to be held for a short period of time" into an IOLTA account. (Appendix E, page 18a; emphasis added.) Although

Rule 4-1.15(d)(2) states that "only" funds of clients that "are nominal in amount or are expected to be held for a short period of time and on which interest is not paid to the clients" may be deposited into the IOLTA account, the Rule fails to give an unambiguous definition--or, indeed, any definition--of funds that "are nominal in amount or are expected to be held for a short period of time and on which interest is not paid to the clients."

Therefore, this Court should grant the writ of certiorari to make clear that *Brown* did not automatically immunize all states' IOLTA programs, and should reverse the Missouri Court of Appeals's judgment because Respondents' application of the Missouri Rule has in fact taken Petitioner's property without just compensation, in violation of the constitutional standard of *Brown*.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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